DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	))	CG Docket No. 02-278 CC Docket No. 92-90

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

Robert Wientzen
President & CEO
Gerald Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030

Ian D. Volner
Heather L. McDowell
Ronald M. Jacobs
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, N.W., Suite 1000
Washington, DC 20005-3917
(202) 962-4800
Counsel for The DMA

TABLE OF CONTENTS

SUMMARY

The Direct Marketing Association: lnc. ("The DMA") is submitting comments in this proceeding regarding the Commission's proposals and questions concerning possible revisions to its current telemarketing rules, as well as the possibility of establishing a national Do-Not-Call list.

The DMA believes that the Commission should make only modest changes to the current rules. The Commission should retain, but modify, its current rules mandating that telephone solicitors retain company-specific do-not-call ("DNC") lists. There is no basis for reversing the Commission's previous finding that company-specific lists are the best means to address consumers' concerns while avoiding unduly burdensome industry regulation. As we discuss in these comments, a survey recently conducted by The DMA shows that its well-known and well-respected, Telephone Preference Service satisfies consumers' expectations in reducing unwarranted telephone solicitations. There is no evidence to indicate that a nationwide DNC list is necessary or would be better than the current rules. And there are potential alternatives – such as mandatory caller ID – that could enhance the efficacy of company-specific lists and, thus, warrant further study. In light of the high turnover rate for telephone numbers, however, The DMA urges the Commission to permit marketers to use National Change of Address – not merely a tclephone number – to verify the continued accuracy of a DNC request, and revise the rules to reduce the retention period for keeping a consumer on the list from 10 years to 5 years.

The Commission does not need to revise the current definition of an "established business relationship" ("EBR") and, in particular. should not attempt to narrow it to apply

only to subsequent solicitations involving "related" goods or services, or apply a temporal limit on EBRs. It also is not necessary to modify the regulations governing pre-recorded messages.

With respect lo predictive dialers, the Commission should clarify that its standards – including a decision *not* to impose new rules, if that is the case – preempt any other regulations that purport to govern the use of predictive dialers. If the Commission determines that the record in this proceeding demonstrates a need for regulatory limits on predictive dialers, The DMA believes that a cap of 5% of answered calls per day is a reasonable limit on "abandoned" calls.

The DMA has traditionally opposed a governmentally imposed national do-not-call list and we still do not believe that a nationwide list is necessary. The DMA has long maintained its own, privately administered Telephone Preference Service ("TPS") and we continue to believe that self-regulation is the best way to address issues in **a** broad and complex medium such as telephone marketing. If, however, the Commission decides to establish a national DNC database, we propose a "Sum of the States" framework. This approach would incorporate existing statewide DNC lists into a single database, to be complemented by use of The DMA's TPS in states that have not enacted DNC legislation. At a minimum, however, the Commission must ensure that this or any other nationwide DNC program achieve several core objectives: It must preempt state DNC list requirements; it must supersede any FTC requirement to subscribe to a national DNC list; and it must exempt calls to persons with whom the calling party has an established business relationship and calls by tax-exempt, non-profit entities.

Finally, if the Commission determines to develop a nationwide DNC database, it must issue a further NPRM to set forth, and seek comment on, specific proposals for detailed implementation of such a program. The Commission must also afford interested parties the opportunity to comment upon any FTC rules issued during the pendency of this proceeding that implicate TCPA requirements or restrictions.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	))	CG Docket No. 02-278 CC Docket No. 92-90

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association, Inc. ("The DMA") respectfully submits these comments in the above-captioned proceeding pursuant to the Notice of Proposed Rulemaking ("NPRM") that the Federal Communications Commission ("Commission" or "FCC") released on September 18, 2002. As requested by the Commission, we comment separately on the two basic themes raised in the NPRM: The first section of these comments address the issues raised by the Commission concerning possible revisions to the current TCPA rules; the second section deals with the legal and policy issues surrounding a possible national do-not-call list.

INTRODUCTION

Founded in 1917, The DMA is the largest trade association for businesses involved in database marketing. We have approximately 5,000 member companies from the United States and over 50 other nations worldwide. Our members include marketers from every business segment, as well as non-profit organizations. The DMA membership reflects the broad array of businesses and organizations that use, or provide services to entities that use, the telephone as a marketing medium. The membership includes direct sellers, list brokers. common carriers. teleservices bureaus, fulfillment companies, and advertising companies. The DMA has established and rigorously

enforces stringent ethical standards for all aspects of direct marketing, including teleservices.

A. TELEMARKETING IS A LEGITIMATE AND EFFECTIVE COMMUNICATIONS MEDIUM.

Although the terms "telemarketing" and "teleservices" are in common use. they are, in fact, misnomers. Telemarketing is not an industry; it is a medium of communication between businesses and the public that they serve or seek to serve. Outbound telemarketing is functionally no different than advertising through radio or television, print media, or direct mail. There is an enormous range of industries that use the telephone to promote the goods and services that they sell or. in the case of a not-for-profit organization, to raise funds to support their philanthropic, eleemosynary, and political activities.

While it is well known that telephone companies. financial service organizations (including, but not limited to, banks), and cable operators all promote their services through outbound telephone marketing. there are a host of other industries that use the telephone extensively as a medium of communication with both present and prospective customers. These include, for example, retail stores (so-called "brick and mortar" businesses), magazines, newspapers, realtors, insurance companies, and home service companies ranging from dry cleaners to lawn care. Total sales to consumers last year from outbound marketing via the telephone amounted to $296 billion. The industry's contribution to the overall well-being of the economy – in terms ofjobs. manufacturing, and the provision of goods and services – far exceeds that number. It is vital that the Commission keep in mind the breadth and scope of the industries that use this medium in its consideration of the legal and policy issues at stake.

It is also a mistake to view outbound telephone marketing in isolation. It is true that there are other media through which, in theory, businesses that are now heavily or exclusively dependent upon outbound telephone marketing could attempt to reach their customers or their desired audience. Yet, outbound marketing by the telephone has been successful – as evidenced by the $296 billion in consumer sales generated last year – because it is a uniquely effective medium of communication. It is convenient to the consumer, and it is interactive and interpersonal in a way that no other advertising medium can replicate. As a result. for start-ups or smaller specialized businesses that do not have nationwide brand recognition, as well as for larger well-recognized businesses seeking entry into new markets or seeking to offer new products or services to established markets, outbound calling is a keystone to the consumer-driven economy that exists in the United States. Outbound marketing serves to fuel other, less discriminating, and more impersonal channels of communication.

At the same time, there is simply no truth to the claim that, unless further and more stringent controls are put on this medium, the American public will he inundated with telephone solicitations. The marketplace and industry self-regulation will and, in fact, have imposed natural constraints on this valuable medium. For example. industry data shows that between 1998 and 2002, the number of billable minutes of outbound telemarketing calls by teleservices bureaus was virtually flat. rising from 3.7 million minutes in 1998 to 3.9 million for 2002. By contrast, the number of inbound billable minutes nearly tripled in rhe same 5-year period from 2.5 million minutes to 6.8 million minutes. Hence, there were nearly twice as many inbound calls – some of which undoubtedly were generated by outbound calls – than there were outbound calls in 2002.

In short, any notion that there is a need for more regulation to curb the growth of a medium that is otherwise out of control is without factual foundation

The Commission conducted a thorough and careful examination of telemarketing practices 10 years ago, when it first adopted the TCPA rules. The rules have imposed significant limits and responsibilities on businesses and, for the most part, they have worked well. With **a** few exceptions, we believe that time and experience have shown that the current rules strike the right balance to accommodate business, regulatory, and consumer interests. Some things have changed in the years since the Commission adopted the TCPA rules, but we do not believe that any of the changes we have seen warrant more than a few modifications to the current regulations. Companies should be permitted to use National Change of Address – not merely a telephone number – to verify the continued accuracy of a DNC request since 16% of the phone numbers change annually. We also urge the Commission to reduce the retention period for company-specific lists from 10 years to 5 years. Beyond this, however, the current rules do not need to be revised. We do believe that more active enforcement of the existing rules would promote greater compliance and help curb abuses. But adding new layers of regulatory burdens will only impair legitimate business and increase consumer costs, it will not coerce greater compliance from those who are not complying now.

2. THE DMA'S TELEPHONE PREFERENCE SERVICE IS VERY EFFECTIVE IN REDUCING UNWARRANTED SOLICITATIONS.

We do not believe that it is necessary to adopt a nationwide do-not-call database. The DMA has a unique perspective on this issue. and extensive experience with the cost and benefits of operating such a databasc. **As** the Commission is aware, since 1985, we have maintained the Telephone Preference Service, or "TPS," which identifies

individuals who have indicated that they do not want to receive promotional calls at home. The TPS is a file of individuals who have contacted The DMA to register with TPS by providing their names, home addresses, and home phone numbers. Consumers can register for TPS by mail, fax, or over the Internet. Consumers find out about the service through state and local consumer agencies and print and broadcast advertising. Once registered, they remain on the list for five years. The TPS currently includes approximately 7.5 million names.

All DMA members are required to subscribe to the TPS as **a** condition of membership. We also make the list available to non-members. Marketers are not, however. required to use TPS to suppress calls to customers. The list is updated monthly, and TPS subscribers can elect to receive it on a quarterly or monthly basis. Subscribers also must agree to use the TPS data only for the purpose of removing consumers' names from their calling lists and not for any other purpose.

The TPS is very effective in reducing unwanted solicitations, and it is an efficient and manageable tool for marketers to avoid calling consumers who do not want to receive telephone solicitations. In fact, a number of states rely on TPS to serve as their "state" DNC list. Connecticut's state-managed do-not-call list is incorporated into The DMA's TPS tile. Beginning October 1. 2002 The DMA also began to distribute the TPS list for the state of Pennsylvania. Subscribing to the DMA's TPS file also satisfies do-not-call requirements in Maine, Vermont, and Wyoming.

In the NPRM, the Commission specifically inquired about the effectiveness of private-sector initiatives such as the TPS.[1] Therefore, we commissioned a survey of 400 TPS subscribers, and 400 non-subscribers, to get a sense of consumers' current perceptions about the service. We were particularly interested in learning whether consumers perceive it to be easy or difficult to get on the list, and whether or not they receive fewer unwanted calls after they get on the list. We are delighted to report that subscribers think that the TPS is working very well.

Nearly 80 percent -- 78.58% – of TPS subscribers responding' said that it is either "extremely easy" or "very easy" to sign up for the TPS service. Notably, those who register by mail (47%), telephone (25%), and over the Internet (18%) rated all methods of registration as "very easy" to use. Thirty-two percent of all 400 TPS subscribers that we surveyed reported that they are "somewhat satisfied" with the level of service that TPS has provided. Another 46 percent reponed that they are either "extremely satisfied" (14%) or "very satisfied" (32%) with the level of service. Perhaps most significantly, an overwhelming 80.5 percent (322) of subscribers surveyed said that that they noticed a decrease in the number of telephone solicitations that they have received since registering with the TPS. Among those reporting a decrease in calls, **42** percent said that they have noticed a "substantial" decrease and another 45 percent noticed a "moderate" decrease. The survey result make clear that that TPS is not only consumer-friendly and easy to use, but also highly effective in limiting unwanted solicitations.

---

1 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, FCC 02-250 (Released Seprernher IS. 2002) ¶17 (hereinafter "*NPRM* at __").

A small number – 41 **or** 10 2% – of the 400 subscribers surveyed said **that** they did not know or refused io give an answer to this question

We recognize that governmentally-imposed DNC lists have become popular in the states. And they might *seem* like an easy way to address consumer complaints about annoying, unwanted calls. Indeed, if the Commission finds compelling reasons to establish a federal database, we offer suggestions for how to structure it to balance the sonietimes-competing interests of consumers, regulators. and businesses. Nonetheless, as our TPS survey results indicate, existing self-regulatory efforts to reduce unwanted telephone solicitations, in conjunction with company-specific DNC lists, are highly successful and provide ample protection for consumers

Moreover, the Commission evidently believes that the existing company-specific DNC requirements have worked well. since it has not issued any fines for non-compliance since the rules were adopted in 1992. These and other factors that **we** discuss below lead us to conclude that a government-mandated nationwide DNC list remains as unnecessary today as it was 10 years ago.

PART I - COMMENTS REGARDING THE CURRENT RULES

A. THE COMMISSION SHOULD RETAIN – BUT MODIFY – ITS RULES FOR COMPANY-SPECIFIC DO-NOT-CALL LISTS

1. The Current Rules Work And A National Do-Not-Call List is Unnecessary

(a) There Is No Credible Evidence That The Current Rules Do Not Work

In 1992, the Commission carefully and exhaustively weighed the detailed criteria specified by Congress in the TCPA io determine whether or not it should establish a national "do-not-call" ("DNC") database. The Commission concluded that establishing such a regime would be costly. cumbersome. unduly intrusive upon legitimate business and marketing practices and, ultimately, unnecessary to protect consumers' interests.

The Commission faces an extraordinarily high burden to reverse its 1992 decision not to implement a national do-not-call list. The Commission must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[3] In fact. there is a presumption *"against* changes in current policy that are not justified by the rulemaking record."[4] Nothing has so changed in the decade since the FCC implemented the TCPA that it justifies the profound shift in policy that this Commission may be contemplating or that the Federal Trade Commission ("FTC") – without statutory authority – is contemplating.

Any notion that unsolicited telemarketing calls are generally offensive to the American public simply is not borne out by fact. Telemarketing is a legitimate business and communication tool that produced over $296 billion in sales last year. Consumers buy many different types of goods and services offered by phone. They also make repeal purchases by phone, Some of the largest users of telemarketing include banks and financial institutions, telephone and cable companies, and insurance companies. In many cases, the products that companies sell and the terms on which they are marketed are heavily regulated. Magazine and newspaper publishers, and charitable, religious, and political organizations also make extensive use of the phone for purposes that involve the sale of goods or services.

The Commission explains that its NPRM is prompted in part by increased consumer complaints[5] and. thus, perhaps believes that the number of complaints about

---

Motor Vehicle Ass'n. v State Farm Mutual Auto Ins. Co., **463** U.S. 29, 42 (1983) (rejecting agency's decision to reverse course in a rulemaking because of lack of record evidence and reasoned analysis).

Id. (emphasis in original)

NPRM at ¶¶ 4. 49.

telephone solicitation is proof that the current system of company-specific lists does not work. This is wrong. The presence of complaints is a sign that consumers are aware of the law and their rights, that they understand how to file complaints, and possibly that the Commission must enforce its existing regulations more aggressively. For instance. the Commission has not imposed fines on businesses that have violated the company-specific do-not-call requirements. The recent *Fax.com* case, on the other hand, is an example of aggressive enforcement that is likely to lead to increased compliance with regulations dealing with "junk" faxes.[6] Indeed, the lack of enforcement against telemarketers for violations of the current, company-specific DNC rules would indicate that the Commission believes they are working.

Moreover, the complaints logged by the FCC, the FTC. and states make up an infinitesimally small percentage of the total calls made. The Commission notes that for the two-year period from January I, 2000 through December 31, 2001, it received approximately 11,000 complaints. Based on the data set forth in the NPRM. this represents *less than one hundredth of one percent* of telephone solicitation calls made during this period. **And,** the reality is that a very large number of these complaints has nothing to do with compliance with DNC requirements.

There is a further reality: **A** shift from the existing company-specific regulatory program to a national DNC list would not materially reduce the number of complaints that the Commission receives. It would obviously have no effect on complaints about other TCPA issues. Moreover. even DNC-related complaints are not a function Of the type of do-not-call regime imposed. They are purely and simply a function of the number

---

Fak.com. Inc., *Notice of Apparent Liability for Forfeiture*, I7 FCC Rcd. I5927 (2002)

of calls that are made. Undoubtedly, the absolute number of DNC-related complaints that the Commission has received has increased since the TCPA was first implemented. So have the number of names on The DMA's TPS list. During that same period. however, the population has increased; the number of telephone solicitation calls made has increased; the number of industries and non-profit and political organizations using telemarketing has increased; publicity about DNC lists and consumers' rights has increased; and the sales volume resulting from telemarketing calls has increased. The rate of increase in complaints is nowhere near proportionate to the increased sales rate.

The question of cost must also be taken into account. The evidence before the FCC in 1992 showed that the cost of establishing a national list far outweighed any benefits it might provide consumers. Technological advances may have reduced the start-up costs somewhat, although the FTC's $12 million estimate is unsubstantiated and unrealistic. Nonetheless, there will be a cost to the list manager, to marketers, and to the public. Ironically, and irrationally, these costs ultimately will be borne by consumers who *do* want to receive information about goods and services by telephone and who *do* purchase in response to those calls.

In balancing the costs and benefits of a governmentally-imposed nationwide DNC program, the Commission must also recognize that imposing a more sweeping DNC program will inevitably mean sacrificing jobs that employ millions of people. In 2001, the telemarketing industry that markets to consumers was estimated to affect 4.1 million jobs.' No matter how it is framed, a governmentally imposed nationwide program will result in increased compliance costs. Increased administrative costs will ultimately

---

WEFA Group. Economic Impact U.S Direct and Interactive Marketing Today, 2002 forecast

translate into higher priced goods and services, higher unemployment, and delayed recovery in industries – such as telecommunications and magazines – which have been very hard hit by the recent economic downturn.

Given the variety and breadth of economic interests that would be affected. The DMA is not in a position to estimate the full cost of a national list, but we have not seen anything to suggest that any benefits of a national list now outweigh its cost. Again, the balance of interests has not changed since the Commission's initial decision to adopt company-specific DNC requirements.

The vast majority of telemarketing calls are made by legitimate marketers offering legitimate goods and services to the public. As required by the Commission's rules, these companies maintain policies and procedures to ensure that consumers who do not wish to receive calls from them are placed on their DNC lists. Organizations that use telemarketing as a medium of communication have business reasons – quite independent of the risk of legal sanctions – to see to it that their policies and procedures are followed. To the extent that there are non-exempt companies that are systematically ignoring or seeking to evade the TCPA rules, the solution lies in enforcement, and there is no evidence of a pattern or practice of violation by legitimate marketers.

Moreover, we believe that the real concern underlying consumers' DNC complaints is not principally one of outright noncompliance. It is one of timing: Consumers expect that a do-not-call request will instantaneously translate into a cessation of *calls* from that particular marketer or from a family of companies under common ownership. That does not happen now. and it would not happen if the Commission adopted a national do-not-call list. As experience with statewide lists demonstrates, there is an unavoidable interval between the time a consumer requests not to be called and the

time that the state compiles or updates its data and the information is incorporated into marketers' databases and acted upon. Further, the risk of errors and omissions is greatly compounded under a national. governmentally controlled DNC program. Just recently, a "glitch" in a state computer resulted in the inadvertent omission from the statewide list of thousands of consumers who thought that they had been placed on that statewide list. These problems will persist – and be magnified – with a national do-not-call list, just as it does in the states that have adopted statewide do-not-call regimes.

In short, adopting a national DNC list would "go after a gnat with a sledgehammer."' The solution to the modest problem of consumer complaints is not a new list, bur much more aggressive – and narrowly tailored – enforcement of the current rules.

(b) There May Be Alternatives to Bolster the Existing Rules

The Commission asks whether there are changes to its rules, short of adopting a national DNC list, that might make the existing company-specific regime more effective and more amenable to meaningful enforcement. The DMA believes that the idea of requiring marketers (and their service bureaus) to transmit caller ID information (either an identifiable telephone number or a company logo) is worthy of further exploration. On the other hand, the idea of coupling such a requirement with a unique identifier – which amounts to a special access code – is unworkable, unlawful, and unconstitutional.

Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 64 (D.C. Cir. 1972) (Bazelon, dissenting)

1. *Mandatory Culler ID*

The FTC is considering, and several states now have, rules to prohibit persons making what the TCPA defines as a "telephone solicitation" from blocking or circumventing the transmission of caller ID information (a rule The DMA fully supports). A related proposal, which this Commission has raised in this proceeding, is whether or not such a requirement should be taken a step further by affirmatively requiring "tclcmarketers" to transmit caller ID information. In principle, The DMA does not oppose the adoption of such a requirement. Yet, before the Commission takes that step it should seek further comment regarding the costs and consequences of a specific proposal for such a requirement.

It is probably technologically feasible now for most marketers and service bureaus to generate a logo or telephone number in connection with telephone solicitation calls. By itself, that is not a sufficient basis for the FCC to mandate transmission of caller ID.

First, there is the question of cost. Marketers and service bureaus may not be able economically to generate caller ID information because of the expense of changing. upgrading, or replacing existing equipment, software, and network configurations that they now use. Small marketers and service bureaus may be the most dramatically affected.

Second, it is far from clear that requiring marketers to use caller ID is going to achieve the Commission's objective of permitting a broad segment of the American population to know who is calling them. Generating caller ID information is only the first step in the process. It is equally important, in terms of the purpose of such a requirement, that the information actually gets passed to the called party. It is extremely

unclear how much of the country is now served by SS7, upon which caller ID depends. The Commission needs to determine the size of the population that lives in communities served by central offices that do not have the capability to pass caller ID information. The Commission also needs to assess how many telephone subscribers actually subscribe to caller ID in markets where it is available.

Third, the Commission needs to consider carefully the technological and practical challenges of a inandatory caller ID requirement and how to address them. For instance, in some situations it may be desirable for the calling party to display a telephone number that consumers can actually call to reach a customer service representative rather than the originating line. This may he especially important for service bureaus calling on behalf of multiple clients, or in joint marketing arrangements. It is not clear, however, that this IS feasible. If companies are permitted or required to transmit a name or logo, the Commission needs to consider appropriate protections for their intellectual property rights. The Commission must also take into account the relationship between caller ID and any limit on call abandonment or the use of answering machine detection. For example, as a general rule, marketers should not be subject to liability for repeatedly disconnecting multiple calls to a single number if those calls are not answered by a live person. even though caller ID would indicate they have tried several times to reach that consumer.

A mandatory caller ID requirement, therefore, has promise as a method to bolster the existing company-specific DNC list rules. But without answers to these and related questions, it is premature for thc Commission to decide that mandatory caller ID is an appropriate supplement to the existing DNC program.

ii. *Unique Identifiers*

A related suggestion that the Commission advanced in its NPRM is assigning a unique identifier – a special access code or "SAC" – which telemarketers would be required to generate as part of caller ID. This is not only unworkable, but also unlawful. Mandatory caller ID may be defensible as a time, place, and manner constraint upon speech. A mandatory "telephone solicitation" identifier imposes a vague standard and amounts to compelled speech, and is, therefore, potentially unconstitutional.[9]

There is no definition of "telemarketer" in the TCPA. Nor is there any practical way to objectively identify a telemarketer, As the Commission learned in the course of its toll-free number proceedings, the Census Bureau assigns industry identifiers by the business in which a company is engaged, not by the means it chooses to market its goods. Banks are not telemarketers. they are engaged in the provisions of financial services; cable operators, telephone companies, retail merchants, realtors, and others are not telemarketers, either. There are just no objective standards to which the Commission can refer to decide who would be subject to a unique identifier requirement. There also is no evidence that carriers have the capability to offer or support the use of unique identifiers.

The definitional problem is compounded by a lack of explicit statutory authority empowering the Commission to impose a unique identifier requirement on businesses that use the telephone to promote their goods and services. The TCPA does authorize the Commission to consider the use of "telephone network technologies" as a means of enabling residential telephone subscriber *to* avoid receiving telephone solicitations to which they object.[10] This provision probably would serve as the basis for the

---

[9] *Miami Herald v. Tornillo*, 418 U.S. 241 (1974)

[10] 47 U.S.C. § 227(c)(1)(A).

Commission's contemplated imposition of a mandatory caller ID requirement. Yet, requiring a unique identifier goes further: It rests on the premise that all telephone solicitation calls are objectionable to all residential subscribers. That is a conclusion that the TCPA and its legislative history simply will not support. If Congress had intended the Commission to establish a global single "sponsor identification" requirement for all businesses engaged in making telephone solicitations calls, it would have done so explicitly.[11] In the circumstances, the unique identifier concept is not only unworkable and unlawful; it fails to pass muster under the First Amendment to the Constitution

2. The Commission Should Modify the Rules Governing Retention of DNC Lists

The current TCPA rules provide that company-specific do-not-call requests "must be honored for 10 years from the time the request is made."[12] The DMA maintains that, given the tremendous turnover in telephone numbers, this period should be shortened to five years. Marketers also should be allowed to cross-reference numbers with the Postal Service's National Change of Address ("NCOA") system to verify that a number has not been reassigned.

In its *Memorandum Opinion and Order* in 1995, the Commission changed the requirement that company-specific do-not-call lists be maintained in perpetuity to a ten-year retention period.[13] At that time, the Commission rejected a request for a five-year retenlion period, noting thal although no parties suggested a IO-year period, "we believe

---

11 *Compare, e.g.*, 47 U.S.C. § 317

12 47 C.F.K. § 64.1200(e)(2)(vi).

13 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Memorandum Opinion and Order*, IOFCC Rcd. 12391, ¶¶ 14-15 (1995).

that a five-year period...would not adequately account for the privacy needs of residential telephone subscribers."[14] The facts show that this determination must be re-examined.

Forty million Americans change their address every single year; approximately 16 percent of the U.S. population changes phone numbers every year. Numbers are often reassigned to new customers 90 days after the previous customer leaves that number.[15] The life span of a telephone directory in an urban area is no more than six months. Marketers and consumers are both harmed by a ten-year retention period with such a high turnover of numbers. Marketers are deprived of a legitimate potential contact when a person who has asked to he placed on a do-not-call list moves and a new customer receives that number. Customers who wish to receive calls but who are assigned a phone number on a do-not-call list are similarly harmed because they cannot receive the calls.

Many states that have imposed statewide do-not-call requests have recognized the mobility of Americans and require annual renewal of requests to be placed on such lists. The DMA proposes a more moderate period of five years. **A** DNC request once every five years is hardly **a** significant burden on a consumer. In a five year period, a marketer's products or services may significantly change and a consumer may change his or her mind about being on that company's do-not-call list. On the other hand, a phone number that is wrongfully off-limits – in the sense the person who has the number is not the person who requested to be placed on the do-not-call list – for an additional five years

---

[14] *Id* ¶ 15

[15] Commissioner Abernathy has noted the high rare of churn in her dissent suggesting forbearance tor more than one year or even permanently in the wireless portability proceeding. Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability. *Memorandum Opinion and Order*, 17 FCC Rcd. 14972 (01-184) (Abernathy. dissenting) ("Based on Commission data. we have not seen any significant decline in churn over time. Nor has any parry *to* this proceeding produced any evidence of a significant decline in churn in any market segment or region of the country.")

is a potential lost customer, which places a very high and unreasonable burden on industry.

B. THE COMMISSION SHOULD RETAIN THE CURRENT DEFINITION OF "ESTABLISHED BUSINESS RELATIONSHIP"

The Conimission has asked whether it should narrow the current definition of an "established business relationship ("EBR'). The answer is no. The exemption is statutory and Congress included it for Constitutional as well as policy reasons. Although there might be an initial impulse to limit the scope of an EBR as a means of reducing complaints, doing so would be contrary to the *terms* and purposes of the statute, needlessly complicate the administration of the rules, stifle legitimate business, and undermine consumer expectations.

The TCPA defines "tclephone solicitation" as "the initiation of a telephone call or message *for the purpose of encouraging the purchase* ***or rental*** *of,* ***or*** *investment in, property, goods,* ***or*** *services*, which is transmitted to any person, but *such term does not include* a call or message . . . to any person with whom the caller has an established business relationship."""[16] The structure of the definition demonstrates that regardless of how an EBR is defined, a business is allowed to encourage the purchase or rental of goods or services that it offers. There is nothing in the definition that indicates that the solicitation must be or should be "related" to the transaction or inquiry upon which the EBR is based. Rather, the EBR provision exempts any call made by a marketer to any person with whom the marketer has a business relationship. Therefore, any effort to define EBR narrowly to encompass, for csaniple, only "related" goods or services, is contrary to the language and purpose of the TCPA.

[16] 47 U.S.C. § 227(a)(3) (emphasis added)